

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
PEDRO RODRIGUEZ GARCIA,  
  
Defendant.

NO. CR-09-6093-EFS

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS AND DENYING  
AS MOOT DEFENDANT'S DISCOVERY  
MOTION**

A pretrial conference occurred in the above-captioned matter on March 11, 2010, in Richland. Defendant Pedro Rodriguez Garcia was present, represented by Nicholas Marchi. Assistant United States Attorney Alexander Ekstrom appeared on the United States' behalf. Before the Court were Defendant's Motion to Dismiss Indictment (Ct. Rec. [46](#)) and Defendant's Request for Discovery and Inspection Pursuant to Fed. R. Crim. P. 16 (Ct. Rec. [33](#)). After reviewing the submitted material and relevant authority and hearing from counsel, the Court is fully informed. This Order memorializes and supplements the Court's oral dismissal of the Indictment.

**A. Defendant's Motion to Dismiss Indictment**

Mr. Garcia asks the Court to dismiss the Indictment because the underlying removal order is invalid given that the immigration judge

1 erroneously determined that Mr. Garcia was an aggravated felon based on  
2 his drug possession conviction, a determination that prejudiced Mr.  
3 Garcia. The Government concedes that under current Ninth Circuit case  
4 law, *United States v. Cazarez-Gutierrez*, 382 F.3d 905, 910 (9th Cir.  
5 2004), the immigration judge's aggravated-felony decision was erroneous,  
6 but the Government submits that *Cazarez-Gutierrez* should not apply  
7 retroactively because at the time the immigration judge made his decision  
8 the law regarding what state drug crimes qualified as aggravated felonies  
9 was unsettled.

10 1. Background

11 On February 19, 1991, Mr. Garcia was convicted of Unlawful  
12 Possession of a Controlled Substance in Washington state court. More  
13 than ten years later, in 2003, Mr. Garcia was served with a notice  
14 setting an immigration removal hearing. On March 10, 2003, the  
15 immigration judge ruled that Mr. Garcia's state conviction was an  
16 aggravated felony and therefore ordered him removed. Mr. Garcia was  
17 removed on March 11, 2003.

18 Mr. Garcia returned to the United States and was charged with the  
19 instant Indictment on February 8, 2010, charging illegal reentry in  
20 violation of 8 U.S.C. § 1326.

21 2. Authority and Analysis

22 The existence of a prior removal order is a predicate element in a  
23 § 1326 illegal reentry offense. Therefore, a defendant charged with this  
24 offense may collaterally attack the underlying removal order by  
25 establishing: 1) that he exhausted any administrative remedies that were  
26 available to seek relief against the order; 2) improper deprivation of

1 the opportunity for judicial review; and 3) that the entry of the  
2 deportation order was fundamentally unfair. *United States v. Camacho-*  
3 *Lopez*, 450 F.3d 928, 929 (9th Cir. 2006) (citing 8 U.S.C. § 1326(d)).

4 The Court starts with the last requirement: fundamental unfairness.  
5 A deportation order is "fundamentally unfair" if 1) the alien's due  
6 process rights were violated during the underlying deportation proceeding  
7 and 2) he suffered prejudice as a result. *United States v. Zarate-*  
8 *Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998); see also *United States v.*  
9 *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004).

10 In 1991, when the immigration judge determined that Mr. Garcia's  
11 state drug possession conviction was an aggravated felony, the Ninth  
12 Circuit had not yet clarified what state drug felonies qualified as  
13 aggravated felonies for deportation purposes. The Ninth Circuit  
14 clarified this issue in *Cazarez-Gutierrez*, ruling that a state felony  
15 drug offense qualified as an aggravated felony if it a) was punishable  
16 as a felony under federal drug laws or b) contained a trafficking  
17 element. 382 F.3d at 912. It is undisputed that Mr. Garcia's state drug  
18 possession offense was not punishable as a felony under federal drug laws  
19 and did not contain a trafficking element. Therefore, under *Cazarez-*  
20 *Gutierrez*, Mr. Garcia's state drug possession conviction is not an  
21 aggravated felony. The parties disagree as to the consequence of the  
22 immigration judge's erroneous (in light of *Cazarez-Gutierrez*) aggravated-  
23 felony finding.

24 The Court concludes that *Cazarez-Gutierrez*, which is a substantive  
25 interpretation of "aggravated felony," applies retroactively to Mr.  
26 Garcia's deportation proceeding. See *United States v. Camacho-Lopez*, 450

1 F.3d 928 (9th Cir. 2006) (applying subsequent Supreme Court decision,  
2 which defined "crime of violence," to prior removal order); *United States*  
3 *v. Ponce*, No. 08cr3239WQH, 2009 WL 1212731 (S.D. Cal. May 4, 2009)  
4 (applying *Cazarez-Gutierrez* retroactively and determining that  
5 immigration judge erroneously determined that state drug possession  
6 conviction was an aggravated felony). This is because the underlying  
7 removal order serves as a predicate element of the § 1326 charge.  
8 Accordingly, Mr. Garcia's due process rights were violated when the  
9 immigration judge determined he was an aggravated felon.

10 Notwithstanding this due process violation, Mr. Garcia must show  
11 that he suffered prejudice as a result. See *United States v. Pallares-*  
12 *Galan*, 359 F.3d 1088, 1104 (9th Cir. 2004). The immigration proceeding  
13 notice stated: "You were on 02/19/91, convicted in the Washington State  
14 Superior Court at Franklin County, Washington for the offense of Unlawful  
15 Possession of a Controlled Substance, Cocaine, in violation of RCW  
16 69.50.401(d);" the notice did not mention any other conviction. Because  
17 the 1991 drug possession conviction served as the sole basis for removal,  
18 Mr. Garcia was prejudiced by the immigration judge's failure to apprise  
19 Mr. Garcia of possible relief from deportation: a failure resulting from  
20 the immigration judge's erroneous aggravated-felony determination. See  
21 *Camacho-Lopez*, 450 F.3d at 930 ("Camacho's Notice to Appear charged him  
22 as removable *only* for having committed an aggravated felony; as discussed  
23 above, Camacho's prior conviction did not fit that definition. Thus,  
24 Camacho was removed when he should not have been and clearly suffered  
25 prejudice.").

1 In sum, Mr. Garcia established that the prior removal order was  
2 fundamentally unfair. He also satisfies the two other collateral attack  
3 requirements: 1) he was improperly denied the opportunity to obtain  
4 judicial review because he was not advised of the possibility of  
5 obtaining relief from deportation and therefore his waiver of his right  
6 to appeal was not considered and intelligent, *see United States v.*  
7 *Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000); and 2) he is exempt from  
8 the administrative exhaustion requirement because he brought a due  
9 process challenge, *see Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th  
10 Cir. 2005). Accordingly, Mr. Garcia's March 10, 2003, removal order may  
11 not support an 8 U.S.C. § 1326 offense; the Indictment is dismissed.

12 **B. Conclusion**

13 For the reasons given above, **IT IS HEREBY ORDERED:**

14 1. Defendant's Motion to Dismiss Indictment (**Ct. Rec. 46**) is  
15 **GRANTED.**

16 2. Defendant's Request for Discovery and Inspection Pursuant to Fed.  
17 R. Crim. P. 16 (**Ct. Rec. 33**) is **DENIED AS MOOT.**

18 3. Defendant is to be **RELEASED.**

19 4. The March 22, 2010 trial is **STRICKEN.**

20 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
21 this Order and to provide copies to all counsel, the U.S. Probation  
22 Office, the U.S. Marshal, and the Jury Administrator.

23 **DATED** this 12<sup>th</sup> day of March 2010.

24  
25 S/ Edward F. Shea

EDWARD F. SHEA

United States District Judge

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